IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-401

BOARD OF COMMISSIONSERS
OF THE MISSISSIPPI STATE BAR,
Petitioner

VERSUS

THE FEDERAL LAND BANK OF NEW ORLEANS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 20, 1979.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Mississippi is printed in Appendix A hereto and the opinion of the Court of Appeals for the Fifth Circuit is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on July 20, 1971. A copy thereof is attached to this petition as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

In September 1974 the Federal Land Bank of New Orleans, without notice to borrowers or attorneys, arbitrarily and capriciously abandoned its longstanding system of an essentially open list of approved attorneys. Previously, borrowers selected attorneys for title opinion and loan closing from an approved list that was open to experienced attorneys. The Bank, acting in conjunction with the local land bank associations, without any objective standards, struck 70% of attorneys or firms from its list and refused to establish any uniform system for admitting additional attorneys.

The District Court held that the Federal Land Bank of New Orleans is, in essence, a private institution and as such acts as it pleases in regard to which attorneys may and may not be employed by its borrowers for the purpose of closing Federal Land Bank loans.

The Court of Appeals did not decide the question of whether or not the Federal Land Bank is a federal agency or a private institution, but held that in either event the arbitrary selection of the attorneys to be used by borrowers for the purpose of certifying title and closing loans was proper. The questions presented are:

1. Is the Federal Land Bank of New Orleans a federal agency, subject to the due process provisions of the Constitution, and the intent of the provisions of the Administrative Procedure Act?

2. Does the Bank have the right to arbitrarily name and limit the number of qualified attorneys who may close interstate real estate loans made by it to those borrowers qualified by federal statute to borrow from the Bank?

3. May the Bank knowingly dampen competition by arbitrarily limiting the number of qualified attorneys borrowers may select for the closing of interstate real estate loans?

4. Should the Bank be required to establish reasonable, objective standards for the inclusion of attorneys upon its list of "approved attorneys" for the closing of loans?

STATUTES AND CODE OF FEDERAL REGULATIONS INVOLVED

5 U.S.C. § 500 (b)
12 U.S.C. § 2002
§ 2011
§ 2013 (a) (b) (d)
§ 2014
§ 2016
§ 2017
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§ 2227 (a) (1)
§ 2241
§ 2242 (a)
12 Code of Federal Regulations § 614.4230
§ 615.4300
§ 615.5060

STATEMENT OF THE CASE

(a) Course of Proceedings and Disposition in the Court Below

John Sibley, a member of the Bar of Mississippi, filed suit in the U.S. District Court for the Northern District of Mississippi, praying for injunctive relief and damages because of the action of the Federal Land Bank of New Orleans in striking him from the list of attorneys authorized to close loans for borrowers from that institution. He also asked that the members of the Bar of Mississippi be included in the action as a class.

Subsequently, the Board of Commissioners of the Mississippi State Bar filed a petition to intervene on behalf of the members of the Mississippi State Bar. Intervention was permitted and thereupon Sibley's original complaint was amended to eliminate the request for class determination and certain claims for damages for defamation. The Bar Commissioners asked for injunctive relief to require the Federal Land Bank to set up objectives, reasonable standards for admission of qualified attorneys to its "list of attorneys" authorized to close loans for the borrowers who are required to select an attorney from the list and pay the attorney's fee.

On completion of discovery, interrogatories and depositions and the filing of certain affidavits, the parties moved for summary judgment and agreed to submit the matter upon the record as it then existed.

The District Court denied the relief requested by both Sibley and the Commissioners, and held that the Bank was a federally chartered private institution and that it could arbitrarily limit the number and identity of the attorneys whom the borrowers might select and must pay to close their loans, and that this action was not violative of either due process, the Administrative Procedure Act or the Sherman Act. Summary Judgment dismissing the complaints of Sibley and the Bar Commissioners was entered. The Court of Appeals of the Fifth Circuit affirmed.

(b) *Statement of Facts.*

1. Position of the parties.

The Federal Land Bank of New Orleans (The Bank) maintains it is a privately owned institution, federally chartered; that it can act arbitrarily and without any objective standards in selecting a limited number of attorneys to handle title certification and closings of real estate loans. Futher, that its actions in this regard are proper, although competition is

admittedly dampened, and the legal services its borrowers must pay for may be more expensive than if a larger nember of admittedly qualified attorneys were available to the borrowing farmer and rancher. The Petitioners feel that this federal instrumentality should be required to accept the title certificate and legal work performed by any Mississippi lawyer meeting reasonable, objective standards, selected by the borrower and adequately performing the necessary legal work involved in closing the loan. The Petitioners urge that the failure of the Bank to do so admittedly results in decreased competition in the handling of interstate loan closings, increases the cost of legal services, denies the prospective borrower the fundanemtal and tranditional right of having his business handled by an attorney of his choice and even of using an attorney already familiar with his title. It also denies to the qualified attorney not on the approved list the right to practice his profession.

2. *The organization of the Bank and its operations.*

The District Court analogized the Bank to federal savings and loan associations or national banks that are privately owned and capitalized. The purpose and history of the Federal Land Banks do not bear this out. In 1929, the Federal Reserve Bank bought $9,500,000 in land bank bonds; between 1934-1936, Federal Farm Mortgage subscribed $200,000,000 land bank bonds. Between 1932 and 1937 Congress appropriated $189,000,000 which was repaid by 1947. The land banks are still eligible for direct federal loans.

The Federal Land Bank of New Orleans is one of twelve such banks, established pursuant to the Federal Farm Loan Act of 1916, and continued in existence by the terms of the Farm Credit Act of 1971, (the Act), 12 U.S.C. 2011, et seq., the basic law now governing its existence and operation.

That same Act, also continued in existence the federal land bank associations, of which there are 34 in the New Orleans Bank's area of operations (Mississippi, Louisiana and Alabama),

12 of which are in Mississippi.

The Bank and the associations are part of a comprehensive farm credit system which also includes the Banks for Cooperatives and the Federal Intermediate Credit Banks and the Production Credit Associations, all under the supervision of the Farm Credit Administration. 12 U.S.C. 2002.

The Farm Credit Administration is an independent agency of the executive branch of the federal government, 12 U.S.C. 2241. The Farm Credit Board establishes the general policy for the operation of the Administration of the component banks and associations comprising the system. One member of this Board is appointed by the Secretary of Agriculture and one from each of the 12 farm credit districts by the President, with the advice and consent of the Senate, 12 U.S.C. 2242 (a).

The function of the land banks is to make long term rural real estate loans, secured by first mortgages, and this is done through the land bank associations in the area of the real estate offered as security, and which require borrowers to take stock in the association handling the loan. The association, in turn, takes voting stock in the federal land bank of its district. Non-voting stock may be held by the Governor of the Farm Credit Administration and the associations. 12 U.S.C. 2013 (a) (b).

Participation certificates may be issued to the non-farmers or non-ranchers who are eligible to borrow, who are rural homeowners, and agricultural facilities, such as processing plants. 12 U.S.C. 2013 (d).

There is a District Farm Credit Board of seven members from the credit district which is coterminous with the Bank's district. Two are elected by the land bank associations, two by the production credit associations, and two by the borrowers or guaranty fund subscribers of the Bank for Cooperatives. The seventh is appointed by the Governor of the Farm Credit

Administration. 12 U.S.C. 2223 (a).

This district board constitutes the Board of Directors of the federal land bank of the district, 12 U.S.C. 2227 (a) (1), so it is seen that only two of the seven members represent the land bank associations in the district, while four come from other federal instrumentalities and one is the appointee of the Governor of an independent federal agency.

Those eligible to borrow from federal land banks, unlike national banks or federal savings and loan institutions, are strictly limited by statute to bona fide farmers and ranchers, those furnishing farm related services, and owners of rural homes. 12 U.S.C. 2016.

The basic method of making Federal Land Bank of New Orleans loans is for the prospective borrower to apply to the land bank association of his area, paying an application and appraisal fee to the association of his area, which appraises the property offered as collateral and otherwise investigates the credit and, if it is favorable, approves the loan.

The borrower must then choose from a limited list of attorneys, now arbitrarily selected by the Bank. The attorney prepares the loan documents which are ordinarily printed forms furnished by the Bank, and certifies the title to the real estate offered as security and the fact that the security instrument in favor of the Bank constitutes a first lien. The association then prepares certain closing statements and issues a draft to the borrower on the Bank, drawn through a commercial bank in New Orleans. The borrower pays all closing expenses, including the attorney's fee. The attorney is paid directly by the borrower. The Bank pays the attorney nothing.

The requirement of the Act as to security provides simply for "first liens on interest in real estate," 12 U.S C. 2017. There is no reference in the Act as to how the existence of such

first liens is to be established.

Chapter 6 of Title 12 of the Code of Federal Regulations contains regulations promulgated for the operations of the federal land banks. Section 614.4230 requires that primary security shall consist of a first lien on interest in real estate. Section 615.5060 contains the sole reference to the method by which this is done, so as to make the loan eligible for permanent inclusion in the collateral pool supporting the land bank bonds, in this language:

> ". . . an attorney has certified that the interest of the bank in the primary real estate security for [the] loan is a first lien on the borrower's interest or its equivalent from a security standpoint."

There is no other reference or requirement in the regulations as to the certification of the first lien and no other reference to an "attorney," or any definition or restriction of that work. Any licensed Mississippi attorney can give a title certificate that would meet the requirements of the law and the regulations.

There is no current minute entry upon the minutes of the Board of Directors of the Bank or of its executive Committee setting up a system of selecting attorneys to handle loan closings for its borrowers, nor approving the arbitrary system of selection of attorneys to be put upon the "approved list of closing attorneys" that has been put into effect by the officers of the bank.

3. *The Bank's system of approving closing attorneys prior to October 1973.*

In order to handle the local legal work involved in the closing of loans, the Bank, in the late 20's and the 30's had a system of accepting abstracts of title from lawyers in Mississippi

communities – or at least those not served by title abstract plants – which were examined by Bank personnel and, if title was found to be good, the Bank staff attorney approved the title. Subsequently, that system was changed so that Mississippi lawyers in good standing, who had as much as ten years' experience in title matters, were permitted, on application, to be listed on an approved list of attorneys that borrowers might employ to examine the records and certify the title to the real estate offered as security, without the necessity of submitting an abstract.

4. *The Bank's present method for listing attorneys.*

In October 1973 a bulletin was issued to the associations and Bank field personnel advising that a moratorium on approving attorneys had been put in effect. Whether or not any Mississippi attorneys were, in fact, put on the approved list by the Bank between that date and September 16, 1974, is not clear from the record but, on the latter date, Mr. Brian Babin, as General Counsel for the Bank, wrote a letter to approximately 70% of the lawyers and firms on the approved list in Mississippi, stating that they were no longer approved to close land bank loans. Mr. Babin stated that the decision as to who to retain and who to drop was his responsibility and he had made the decision.

In a letter to the attorneys and firms retained, also dated September 16, 1974, Mr. Babin stated, in part:

> "Arbitrary decisions have been made in some instances prompted by our desire to reduce the overall number of attorneys involved."

And further stated:

> "Since fewer attorneys are approved now to close loans than in the past, it is expectable (sic) that you

will be handling more loans."

Mr. Babin could give no instance where the decision to drop a name from the approved list was not arbitrary.

On September 12, 1974, Bulletin 466 had been issued by the Bank to the associations, advising them there would be few anticipated changes in the list in the future.

There was no prior consultation with attorneys dropped from the approved list in September 1974 and no consultation with any bar group or association.

Within the memory of the chief legal officer of the bank - - Mr. Babin - - whose title has now changed from that of Chief Counsel, there have never been any problems with the certification of title by Mississippi attorneys. He states that many, if not, in fact, all firms and lawyers dropped from the approved list are qualified attorneys who can properly handle the legal aspects of closing Bank Loans. The only criteria he has stated he used in making the selection was:

> "We told the associations to consider the attorneys they had been dealing with and consider attorneys whom they would like to work with to handle the whole backwall, as we call it, the entire loan transactions, then to consider the means of reducing the number . . ."

again,

> "We didn't say or had no personal awareness for that matter of the relative professional competence of one firm over another firm or others . . .what we are talking about is numerous firms many of which with relatively similar professional qualifications with some being retained and some not apparently because of the desire to have fewer people involved in the process. . ."

The Bank recognizes the obvious fact that the reduction of the list of approved, competent attorneys whose certificates will be accepted by the Bank results in a dampening of competition among those the borrowers may select, and must pay, to handle their Bank loans, though Mr. Babin states in reference to competition in fees:

> " . . . I found some attorneys don't like the word competition because they don't feel the necessity to be competitive. But we don't know where anyone stands with attorney's fees. . . ."
> "All attorneys are paid by the borrower. . . ."
> "We don't really look into it [the fee] to any great extent."

There is now no way for any attorney to come onto the approved list unless there is a lack of an attorney in a community due to death, disbarment, suspension from practice, or other cause that results in having no available attorney for the borrower to employ, in which event the Bank will select another attorney by the same arbitrary method.

The fact that a competent, unlisted attorney may already have done title work on the property offered as security, resulting in the necessity of the borrower paying for the same work twice, is recognized as a fact by the Bank but did not enter into the selection process, and had no effect on the retention or dropping of attorneys, or the refusal to open the list for additional attorneys to be approved.

In addition to the fact there has never been any instance in the past seven years, at least, when any question arose as to the professional competence of any attorney handling Bank loan closings, there also are no records, documents or statistics which support the selection of one attorney over another on the basis of administrative handling, cooperation with Bank or association personnel or other basis of selection.

The Bank refuses to put into effect any procedure that would set up objective standards for the approval of attorneys to be placed on the list of those authorized to close loans for its borrowers, but maintains that it has the absolute right to choose any attorney it desires to list or drop, and neither the public, the Bar, its prospective borrowers, nor anyone else, has the right to question its authority to do so arbitrarily and capriciously.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law in a way in conflict with the decisions of this court in regard to due process, the dampening of competition among lawyers in handling interstate real estate loans and the intent of the provisions of 5 U.S.C 500 (b) in regard to representation of persons dealing with federal agencies.

This case presents an important question of federal law which should be, but has not been settled by this court.

The Board of Commissioners of the Mississippi State Bar is statutorily constituted and has the duty to see that the public has access to lawyers for the performance of necessary legal services free from arbitrary and unreasonable restrictions on availability.

Goldfarb v. Virginia State Bar, 421 U.S. 773, settles the fact that when interstate real estate transactions are involved, the artificial limitation of free and competitive access to legal services is a restraint upon commerce proscribed by the Sherman Act.

Where a government agency goes into the financial marketplace and freely and openly competes with private enterprise in the making of interstate loans, its activities in dampening competition are as effective in damaging the eligible borrower

as would be the activity of any other person.

The Farm Credit Act does not specifically provide for any method of obtaining an attorney's opinion of title. There is nothing which specifically authorizes either a disregard of the express provision of the Sherman Act, nor directs a course of conduct contrary to the terms and the spirit of that Act. Section 1 of the Sherman Act contains no exception, and there is heavy presumption against implicit exemption, *California v. Federal Power Commission*, 369 U.S. 482.

The decision in *Eastern RR Conf. v. Noerr Motor Freight*, 365 U.S. 127, restates the rule that valid government action does not constitute a violation of the Sherman Act, but the opinion is careful to use the word "valid."

The action of the Bank here contravenes the due process, and the included equal protection provisions, of the Fifth Amendment. Due process is denied not only the excluded attorneys, but the borrower who is, by the arbitrary actions of the Bank denied free access to a competitive marketing of legal services.

The powers of government are subject to due process. *Louisville Joint Stock Land Bank v. Rodford*, 295 U.S. 555. Although the Fifth Amendment does not use the term "equal protection of the laws," it is well recognized that due process encompasses, in large measure, the elements of equal protection. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, in which the court set up the "Rational Relationship" of whether a classification is in conformity with due process requirements.

The classification of lawyers retained on the approved attorney list by the Bank was done on the instruction of the Counsel of the Bank to the associations to select lawyers already on the list they would like to work with. He and the Senior Attorney for the states involved went over and some-

times expanded the list. He says the decisions were "in some instances arbitrary." It is admitted no rational or objective standard for the selection was established and no consideration of experience, demonstrated ability or performance was used. The Bank merely selected the lawyers the associations said they would like to work with and arbitrarily struck off others to reduce the list by 70% - - the most invidious discrimination imaginable.

The arbitrary action was recognized by Mr. Babin as having the effect of lessening competition. He wrote the lawyers retained:

> "Since fewer attorneys are approved now to close loans than in the past, it is expectable that you will be handling more loans,"

The prospective borrower was denied due process by the arbitrary action of the Bank in the limitation on available services. This is particularly true where a competent real estate lawyer is already familiar with a title, but the borrower is forced to hire another who must, at the cost of the landowner, duplicate the title work already done.

The attorney stricken from or denied admission to the list of closing attorneys available to borrowers, it obviously invidiously discriminated against by the arbitrary action of the Bank. The right to practice law is a right protected by the due process provisions of the Constitution. ***Schware v. Board of Bar Examiners,*** 353 U.S. 232.

The policy of the United States in regard to free access to legal services by the public is expressed in 5 U.S.C. 500(b) as follows:

> "An individual who is a member in good standing of the board of the highest court of a state may represent

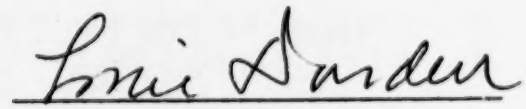
> a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts."

The Court may set aside or enjoin action by a federal agency which is arbitrary or an abuse of discretion. ***Bates and Guild Co.*** v. ***Paynex,*** 194 U.S. 106.

CONCLUSION

This Court should grant certiorari and consider the question of arbitrary denial of due process and dampening of competition involved.

Respectfully submitted,



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APPENDIX A

John F. SIBLEY, Plaintiff-Appellant,
v.

The FEDERAL LAND BANK OF NEW ORLEANS,
Defendant-Appellee,
and
Board of Commissioners of the Mississippi State Bar,
Intervenor-Appellant.
No. 77-1817.
United States Court of Appeals, Fifth Circuit.
June 20, 1979.

* * *

Appeals from the United States District Court for the Northern District of Mississippi.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

The Federal Land Bank of New Orleans ("Bank") reduced by approximately seventy percent the number of Mississippi attorneys on its list of attorneys approved to conduct loan closings for the Bank. The appellants, an individual attorney and the Commissioners of the Mississippi State Bar, brought this action seeking to enjoin the Bank from cutting down its list. The district court granted summary judgment in favor of the Bank, and we affirm.

I.

The Federal Land Bank of New Orleans is one of twelve such banks chartered by the United States pursuant to the Federal

Farm Loan Act of 1916, 39 Stat. 360 (1917), and continued under the Farm Credit Act of 1971, 12 U.S.C. § 2001 *et seq.* The Bank is part of the nation's Farm Credit System, which includes the federal land bank associations, the federal intermediate credit banks, the production credit associations, and the banks for cooperatives, all under the supervision of the Farm Credit Administration. 12 U.S.C. § 2002; *see generally* 12 C.F.R. ch. VI.

The role of the federal land banks in this system is to make rural real estate loans primarily to farmers and ranchers. This they do through the federal land bank associations, of which there are 34 chartered by the Federal Land Bank of New Orleans. The associations own all the voting stock of the Bank;[1] each subscribes to stock in the Bank in proportion to the amount of the aggregate loans held or applied for by members of the association. 12 U.S.C. § 2013. In turn, when a bank makes a loan to a farmer or rancher, the loan applicant subscribes to stock in the association in an amount between five and ten percent of the full amount of the loan, the exact percentage determined by the Bank. 12 U.S.C. § 2034.

All the funds loaned by the Bank come from its own operations. The Bank lends no government funds and receives no government guarantees of its loans or its obligations. [2] The Bank is governed by a seven person board of directors, two elected by land bank associations, another four elected by other entities in the farm credit system, and a seventh ap-

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1/ The Governor of the Farm Credit Administration may hold non-voting stock in the banks. 12 U.S.C. § 2013 (d).

2/ During the Great Depression, the federal government did play a role in the financing of the federal land banks. The Federal Reserve Bank bought $95.5 million in land bank bonds in 1929, and the federal farm Mortgage Association bought $200 million in land bank bonds between 1934 and 1936. From 1932 to 1937, Congress appropriated direct loans for the bank.

pointed by the Governor of the Farm Credit Administration. 12 U.S.C. § 2223 (a).

The Bank's loans for rural real estate are very specifically limited to adequately secured first mortgages. 12 U.S.C. § 2017 requires that "[l]oans shall not exceed 85 per centum of the appraised value of the real estate security, and shall be secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration." *Accord* 12 C.F.R. § 600.20 (1977), 614.4230 (1977). 3/ The statutes and regulations governing the Bank leave to the Bank the methods for ascertaining that its loans meet these requirements. Nevertheless, they make clear that the responsibility to do so is the Bank's 12 C.F.R. § 615.5060 (a) (1977) provides:

> If the chief counsel for a Federal Land Bank has determined in writing that bank procedures provide sufficient safeguards to assure that a loan made by the bank will be secured by a first lien or its equivalent on interest in the primary real estate security, an attorney lien certification need not be obtained at the time a note is accepted for collateral. The note shall be withdrawn from collateral upon the expiration of one year from the date of loan closing, unless before the end of such period, an attorney has certified that the interest of the bank in the primary real estate security for that loan is a first lien on the borrower's interest or its equivalent from a security standing point.

thus, the Bank may either accept an attorney's lien certification or it may rely on its own precedure to fulfil its obligations to loan only on the security of a first lien.

For more than 50 years, the Bank has used outside attorneys to determine whether its interest in a real estate security meets this obligation. During this time, the Bank has maintained a list of attorneys approved to examine and certify title, record instruments, and close loans. The final selection of an attorney from this list for each transaction is made by the loan applicant. The applicant pays the attorney's fee. Originally, the list was selected according to various indicia of reputation, such as the Martindale-Hubbell directory, experience in title examination, and recommendations of Bank Personnel and other practitioners.

The list grew over the years so that by 1974 the Bank's list in Alabama, Mississippi and Louisiana contained more than 1400 law firms and an estimated 3,000 to 3,500 attorneys. In Mississippi, there were 556 firms on the list. From 1922 through 1946, attorneys selected from this list would submit abstracts of title which were then reviewed and approved by the Bank's own in-house attorneys, with the outside counsel handling the rest of the closing. Beginning in 1946, the approved outside attorney would submit a certificate of title rather than an abstract. At the time of the changes at issue here, then, the procedure for obtaining a loan from the Bank was as follows. A prospective borrower would apply to the land bank association in his area, paying to the association fees for the appraisal of his real estate security and the investigation of

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3/ 12 C.F.R. § 600.20 states in part:

> The principal function of the Federal land bank is to make first mortgage loans to eligible applicants.

12 C.F.R. § 614.4230(a) states in full:

> Primary security for a Federal land bank shall consist of a first lien on interest in real estate. In the case of nonfarm rural home loans, the primary security shall be a first lien on the rural residence being financed. The real estate interest must be mortgageable interest under deeds or leases which reasonably may be considered adequate to afford the security of a first lien upon the rights and interest on which the loan is predicated. Collateral closely aligned with, an integral part of, and normally sold with real estate may be included in the appraised value of the security upon which a loan is based. Appraised value shall be determined within approved standards and shall include in the evaluation either farmlands, eligible farm-related businesses, or eligible rural residences, whichever is appropriate for the type of loan being made.

his credit. The applicant would then choose from the Bank's approved list an attorney who would prepare the loan documents, ordinarily printed forms furnished by the Bank, conduct the search, and certify the borrower's title to the real estate security and the first lien status of the Bank's mortgage. Upon such certification, the association would prepare closing statements and issue a draft on the bank. The borrower would pay all closing expenses, as well as the fee charged by the approved attorney.

In 1974, the management of the Bank became concerned about the lapse of time between an application for a loan and the closing of a loan. 4/ In an effort to make more efficient the processing of applications, the Bank instituted a new loan closing procedure. This procedure contemplated less involvement by the Bank itself and greater involvement by the land bank associations and local attorneys. As part of this new procedure, the Bank decided to reduce by 70 percent the number of attorneys approved to handle closings. To carry out this decision, the Bank's duly authorized general counsel solicited from the land bank associations under the Bank their views on the attorneys who should remain on the list. Criteria suggested to the association were admittedly subjective. They included the volume of Bank business which attorneys handled, the efficiency with which they handled it, their professional reputations and competence in title practice, as well as association personnel's own preferences. The general counsel made the final decision as to who should remain on the list.

On September 16, 1974, letters went out both to those attorneys who remained on the approved list and to those who were being dropped, informing them of the new procedure,

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4/ A statistical study furnished by the Farm Credit Administration indicated that Bank's average of 82 days to close a loan ranked 9th among the 12 federal land banks. The fastest bank averaged 54 days.

explaining the use for it, and telling them their status. The letters acknowledged that many qualified attorneys were being dropped from the approved list; the letter to the attorneys who remained on the list stated "[m]any of the firms removed from the list are prestigious and composed of highly competent and reputable attorneys. Arbitrary decisions have been made in some instances prompted by our desire to reduce the overall numbers of attorneys involved." As the district court found nothing said in these letters was detrimental to the attorneys dropped from the list. A subsequent letter to the dropped attorneys to "clarify and amplify" the September 16 letter explained more extensively the new procedure. Under the new system, "imputs by, and involvement of, the Bank will be reduced to a minimum [and] [l]oan closing will be handled almost exclusively by association personnel and approved closing attorneys." The second letter also stressed that the decision to drop certain firms and attorneys was not intended as any reflection on those dropped.

Appellant John Sibley was one of the attorneys dropped from the approved list. He filed this action individually and on behalf of all practicing attorneys in Mississippi. Subsequently, the Mississippi State Bar ("Bar") was permitted to intervene on behalf of all Mississippi attorneys, 5/ and Sibley amended his complaint to seek only individual relief. The appellants alleged that the Federal Land Bank of New Orleans is a federal instrumentality subject to the due process clause, and that the Bank violated the equal protection component of the due process clause, *cf. Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954), by not accepting loan closing

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5/ The Mississippi Bar is created by statute, Miss. Code Ann. § 73-3-101 (1972), and all Mississippi residents admitted to practice are required to be members, Miss. Code Ann. § 73-3-103 (1972).

services of any Mississippi attorney selected by the borrower. In the alternative, assuming the Bank is not a federal instrumentality with respect to its decision to cut the approved list, they claimed that the action restricted competition among Mississippi attorneys and thus violated the Sherman Act, 15 U.S.C. § 1. After discovery, the parties stipulated that there were no material issues of fact and filed opposing motions for summary judgment. The district court granted summary judgment in favor of the Bank.

II.

Much of the argument on appeal focuses on the question whether the Bank is a federal instrumentality for the purposes of its decision to cut the list of approved attorneys. On this issue depend the questions whether the Bank is subject to constitutional requirements on one hand, or to the Sherman Act on the other hand. It our view, the crucial issue on this record is whether the attorney selected by the borrower from the Bank's approved list to certify title and conduct closing represents the borrower or the Bank. Because we agree with the district court that this attorney represents the Bank, we need not decide whether the Bank is a federal agency. The Bank's selection of its own attorneys implicates neither the Constitution nor the Sherman Act.

A

Analysis of the role played by the outside attorney who handles the loan closing indicates that the attorney's primary duty is to the Bank. By the terms of its statutory and regulatory mandate, "[t]he principal function of the Federal land Bank is to make first mortgage loans on farm lands. . . ." 12 C.F.R. § 600.20 (1978). It meets this function by lending only where its security is a first lien. To ascertain that its security meets this requirement, the Bank relies on the attorney who certifies title. This reliance on the attorney's

exercise of professional judgment and discretion is the essence of a lawyer-client relationship. The Bank's present-day reliance on the outside attorney contrasts with its pre- 1946 system of certifying title. There, in-house attorneys of the Bank examined abstracts of title furnished by the outside attorney; it was house counsel's judgment which saw to the Bank's legal obligation. The new loan closing procedure which led to the reduction of the approved attorneys list apparently envisioned even greater reliance on the outside attorney's judgment.

The closing attorney also performs other services for the Bank besides certifying the title: title examination, recordation of the mortgage instruments, and preparation of notes, deeds, financing statements, security agreements, and loan agreements. To be sure, these services also provide a benefit to the borrower. And it is the borrower who makes the final selection of an attorney and pays for his services. Nevertheless, it is the reliance on the attorney to fulfil the Bank's legal obligation to take only first liens which distinguishes between services which otherwise benefit the bank and the borrower equally. That the Bank makes only a partial choice of its attorney does not alter that the choice belongs to the Bank. Payment for the attorney's services, the district court found, merely represents an allocation of the costs of the loan. The borrower remains free to hire an attorney to represent his own interests in processing the loan application. 6/

6/ Perhaps one of the attractions of inclusion on the Bank's list is that it affords the prospect of doing collateral work for the borrower, such as removing clouds on title to make the security eligible for a Bank mortgage. This prospect raises serious ethical problems, however. "The same lawyer can offer different parties title protection, but if he attempts to advise and represent them conflicts of interest arise." *The Proper Role of the Lawyer in Residential Real Estate Transactions: A Report by the Committee on Residential Real Estate Transactions of the ABA* 19 (1944). Thus, the attorney who conducts the closing can only be viewed as representing one party to the transaction. In this case, title protection is a special function for the lender, and so the lender is best viewed as that party.

Our view of the attorney-client relationship in the processing of federal land bank loans accords with the prevailing view of the lawyer's responsibility when selected by a borrower from a list approved by the lender. *Florida Bar v. Teitelman*, 261 So.2d 140 (Fla. 1972); *Wittenbrock v. Parker* 102 Cal. 93, 36 P. 374 (1894); *The Proper Role of the Lawyer in Residential Real Estate Transactions: A Report by the Committee on Residential Real Estate Transactions of the ABA* (1944); Op. 98, State Bar of Michigan Committee on Professional & Judicial Ethics (1946) 7/

Federal Land Bank of New Orleans v. Henderson, Black & Merrill Co., 253 Ala. 54, 42 So.2d 829 (1949), is not to the contrary. In that case, the court considered whether the negligence of the attorney who abstracted title to mortgaged property under the Federal Land Bank of New Orleans' pre-1946 system of certifying title should be attributed to the Bank. The court accepted the Bank's contention that it should not because the attorney was the agent of the borrower, not the Bank. Under the Bank's pre-1946 system of ascertaining whether the Bank's security interest was a first lien, the Bank's own in-house attorneys reviewed the abstracts of title furnished by an approved attorney and determined whether the state of the title met the Bank's first lien requirements. Thus, the pre-1946 system lacked the present system's reliance on the outside attorney's judgment. Under these circumstances, we do not think that *Henderson* binds the Bank today.

7/ The Mississippi Bar points out that the ABA report cited above criticizes the conventional arrangement. The report suggests that the borrower needs the protection more, and, since the lawyer can represent only one party where conflicts arise, the lawyer should represent the borrower. The report recognizes, however, that existing views accept that the lawyer represents the lender.

B

Our conclusion that the client of the closing attorney is the Bank leaves little to discuss of the appellants' substantive arguments. The appellants' due process claim is that the classification between those lawyers who remained on the approved list and those who did not is irrational in violation of the equal protection component of the due process clause of the fifth amendment. 8/ The appellants conceded at oral argument, however, that if the Bank retained a single attorney in each community to do its business, the effect would be no different than where a United States attorney's office hires an individual attorney, and the equal protection clause would not be implicated. To distinguish this concession, the appellants seize on the statement in the Bank's September 16, 1974, letter that "[a]rbitrary decisions have been made in some instances prompted by our desire to reduce the overall number of attorneys involved." Even if the attorneys on the list represent the Bank, the appellants argue, where the Bank maintains a list rather than retaining a single attorney, it cannot make such arbitrary and admittedly subjective decisions.

This fails to distinguish the Bank's list from the retainer of a single attorney. The classification which the list creates is simply one between those attorneys retained and those not; there is no allegation that the line drawn is one "directed 'against' any individual or category of persons." *Marshall v.*

8/ Of course, the fifth amendment does not mention " 'the equal protection of the laws,' " but equal protection is an element of due process. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). "Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).

United States, 414 U.S. 417, 428, 94 S.Ct. 700, 707, 38 L.Ed. 2d 618 (1974). As such, it is sufficient that the classification bears some rational relationship to the Bank's objectives. 9/ There is also no contention that the Bank's decision to reduce the number of attorneys involved in closings, apart from the means chosen to carry out this decision, was in any way unfounded or constitutionally infirm. We think that, faced with large numbers of attorneys indistinguishably qualified to certify titles and carry out closings for the Bank, an "arbitary" reduction was a rational means of achieving the desired end. If the Bank is a federal entity for the purposes of its decision to reduce the attorneys who represent it in its closing business, therefore, its reduction of the list of eligible attorneys would not violate due process.

If the Bank is a private entity, the appellants' antitrust claim is precluded by our decision in *Forrest v. Capital Building & Loan Association*, 504 F.2d 891 (5th Cir. 1974), *aff'g* 385 F. Supp. 831 (M.D. La. 1973). In that case, we held that two savings and loan associations' practice of requiring their borrowers to pay the legal fees of attorneys which the associations selected to examine and certify title and prepare closing papers for mortgage loans was not tying prohibited by the antitrust

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9/ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *City of New Orleans v, Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1176 (5th Cir. 1979); *Jackson v. Marine Exploration Co., Inc.*, 583 F.2d 1336, 1346 (5th Cir. 1978). *See id.* at 1346: "To respond to this argument with [a] more than a few perfunctory cites to decisions such as *Railway Express Agency v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 . . . and Williamson v. Lee Optical Co., *[348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563]*, *supra*, gives it a stature it scarcely deserves."

laws. Our conclusion that the attorneys on the Federal Land Bank's approved list represent the Bank and not the borrower leaves no room for a distinction between the present case and *Forrest*.

The decision of the district court is
AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOHN D. SIBLEY,

Plaintiff

V.

THE FEDERAL LAND BANK OF NEW ORLEANS,

Defendant

and

BOARD OF COMMISSIONERS OF THE
MISSISSIPPI STATE BAR,

Intervenor

No. EC 74-116-S

MEMORANDUM OF DECISION

This is an action brought by Plaintiff John D. Sibley (plaintiff), a member of the Bar of this court and of the Mississippi State Bar. Plaintiff practices law in Okolona, Chickasaw County, Mississippi.

The Mississippi State Bar (Bar), an association created by

1/ All resident persons admitted to practice law in Mississippi are required to be members of the Mississippi State Bar. Miss. Code Ann. § 73-3-103 (1972).

statue, 2/ was thereafter permitted to intervene as a party in interest on behalf of its members. The original complaint was brought as a class action on behalf of all practicing attorneys within the state. When the complaint of intervention was filed on behalf of the class members, plaintiff filed an amended complaint seeking only individual relief.

The defendant is the Federal Land Bank of New Orleans (Bank) a federally chartered instrumentality of the United States. The Bank was chartered March 8, 1917, pursuant to the Federal Farm Loan Act of 1916. The Bank's only office since its inception has been and is now located at New Orleans, Louisiana, which is its corporate domicile. The Bank serves an area composed of the States of Mississippi, Louisiana and Alabama, and operates under the supervision of the Farm Credit Administration, an independant agency of the executive branch of the government.

The organic law under which the Bank and its associations were established and which superseded prior federal laws, is the Farm Credit Act of 1971, Public Law 92-181, 12 U.S.C. §§ 2001-2259 (Act). Regulations promulgated by the Farm Credit Administration pertaining to the Bank and its associations are found in 12 C.F.R. §§ 600-619.

The Bar and the Bank have each moved for summary judgment. All parties, including plaintiff, have represented to the

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2/ Miss. Code Ann. § 73-3-101 (1972) provides:

> The resident lawyers now authorized to practice law in the State of Mississippi are hereby and herewith constituted an association which shall be known as the Mississippi State Bar.

court that there is no geninune issue as to any material fact and that summary judgment procedure is the proper vehicle to determine the rights of the parties. The action has been submitted on the pleadings, depositions, answers to interrogatories, admissions on file together with the affidavits presented by parties.

The record in the action sub judice reflects the facts which follow herein.

All of the voting stock of the Bank is owned by the associations which the Bank charters. See, Farm Credit Act of 1971, 12 U.S.C. § 2001, et seq. These associations are situated in the area of the United States served by the Bank. The stock may not be transferred, pledged, or hypothecated, except as authorized by the applicable chapter of the Act. 12 U.S.C. § 2013. Each of the twelve Mississippi associations chartered by the Bank are obligated to subscribe on behalf of the association for stock of the Bank equal to not less than $5.00 nor more than $10.00 per $100 of the amount of the aggregate loans desired or held by the members of the association. 12 U.S.C. § 2031. When an association makes a loan available to a farmer or rancher, the applicant must subscribe to stock in the association in an amount not less than 5 per centum nor more than 10 per centum of the full amount of the loan as determined by the Bank. The stock must be paid for at the time the loan is closed. The association must then purchase a similiar amount of stock in the Bank. When the loan is repaid the stock is retired at its fair book value not to exceed par value. 12 U.S.C. § 2034.

The Bank may borrow money and issue notes, bonds, debentures, and other obligations individually or in concert with one or more other banks of the system of such character and on such terms, conditions, and rates of interest as may be determined. 12 U.S.C. § 2012 (10). The loans made by the Bank shall not exceed 85 per centum of the appraised value of the

real estate security, and shall be secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration. The value of security shall be determined by appraisal under application standards prescribed by the Bank and approved by the Farm Credit Administration, to adequately secure the loan. 12 U.S.C. § 2017.

The Bank is a privately owned, privately capitalized institution which makes long term first mortgage loans on farm land to farmers and ranchers throughout the area served by its associations. The Bank does not lend government funds and neither its loans nor its obligations are guaranteed by the United States Government.

The Bank has a seven person board of directors which establishes policies under which operating procedures are developed. Two of the members of the Board are elected by the associations of the Bank, i. e., the associations of farmers and ranchers which have been created and chartered by the Bank. 12 U.S.C. § 2223 (a).

The Act does not provide guidance for the manner in which the Bank shall determine that the loans made by it are secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration. The regulations promulgated by the Farm Credit Administration are silent on the procedure to be utilized by the member banks in making the determination. The Board of Directors of the Bank have not formulated a plan to be followed by the management of the Bank. The Bank acts, however, through its duly elected and authorized personnel. In this instance the Bank's General Counsel, W. Brian Rabin, Esq., is charged with the duty and responsibility of approving and coordinating the closing of loans for the Bank. He is responsible for insuring that loans made by the Bank are secured by first mortgages. It was under Mr. Rabin's direction ans supervision that the "New Loan Closing Procedure" was introduced in the fall of 1974. The

object of this litigation is to enjoin the implementation of this plan for the closing of loans by the Bank as being in violation of the constitutional rights of plaintiff and other members of the Bar.

The activities of the Bank in furnishing credit for the farmers and ranchers within the area served by the Bank are extensive. The Bank has been engaged in that service for more than 60 years. The record reflects that for the period from and including 1965 to and including 1974, the Bank closed 11,052 loans aggregating the sum of $402,033,000 in which the service of a Mississippi attorney was required. The loans increased during the period from 1,174 loans amounting to $19,938,100 in 1965 to 1,303 loans amounting to $63,083,100 in 1974.

For more than 50 years the Bank has maintained a list of Mississippi attorneys approved to participate in loan closings. Orginally, attorneys were approved to submit abstracts of title which were reviewed by staff attorneys located in the Bank with the loans ultimately closed by the attorney submitting the abstract. Attorneys preparing abstracts also certified to the validity of title. In addition, abstracts were prepared by non-attorneys and these abstracts were likewise reviewed and approved by Bank attorneys.

In 1946, a change in the system was implemented whereby selected attorneys were approved to submit certificates of title. At that time, of the 82 counties existing in Mississippi, there were 40 where attorney's certificates would be accepted The attorneys whose names appeared on the approved list were selected on the basis of recommendations from filed personnel, recommendations of fellow practitioners, the number of years of experience in the title practice field with particular reference to the degree of proficiency in this practice by the attorney involved and by reference to publications such as *Martindale - Hubbell.* Generally, the professional proficiency and reputation of the attorney in the community were considered his-

torically relevant to approval as a closing attorney.

Over the years the list of approved attorneys continued to grow so that in 1974 the Bank's list in the three states - Alabama, Mississippi and Louisiana - contained more than 1,400 firms, which included an estimated 3,000 to 3,500 attorneys. This list contained an estimated 30% of all licensed practitioners in the three states. In Mississippi alone the firms appearing on the list had grown to 556 in 1974.

The Bank's management became concerned over the ever increasing number of attorneys on the list, many of whom had become for one reason or another inactive in the title practice field. For reasons which Bank management determined to be satisfactory, a new loan closing procedure was instituted with the view of improving the service rendered its borrowers, and, at the same time, reducing the costs of the service and increasing the income to be derived by the Bank from the loans closed. The record is replete with the reasons which management believed dictated such a new loan closing procedure on its part. Since the court finds that the Bank's management, being charged with the duty of properly conducting the affairs of the Bank, could act upon its own findings in that regard, and neither the plaintiff nor the class represented by the intervenor have legal grounds to question the Bank's motive in adopting a new loan closing procedure, the court does not feel that a discussion of the reasons activating the action of the Bank would be of benefit to any interested party.

To carry into effect the new loan closing procedure the Bank's general counsel, Mr. Rabin, addressed a series of letters to the attorneys on the approved list who were being removed, the attorneys who were being retained, and the borrowers of the Bank.

The letter to the attorneys who were not being retained on the approved list, mailed on September 16, 1974, stated the

reasons for the Bank's action and did not in the opinion of the court, contain any offensive or detrimental remarks. The letter related in clear and adequate language the need for a reduction of the list.

The letter to those attorneys who were retained on the list of approved attorneys, released on September 16, 1974, advised them of the new closing procedure and solicited their professional expertise in cooperating with the Bank to make the new procedure a successful undertaking.

The letter of information going forward to the borrowers on October 14, 1974, in a tactful way acquainted them with the new procedure. It did not, in any since, cast a reflection upon the professional integrity or competency of those attorneys who were being removed from the approved list.

The decision to remove some attorneys form the approved list and retain others was made by Mr. Rabin and his associates in the legal department, after checking with field personnel. The record shows that important factors in the decision to inaugurate the new closing procedure were the interest which the Bank had in providing more effecient service to the borrower and in reducing the number of approved attorneys to a more manageable level. Mr. Rabin listed as the basic criteria used by him and his staff in the selection of the attorneys to be retained on the approved list, as being the professional competency of the attorney, the activity of the attorney in title practice, the reputation of the attorney for the efficient and prompt handling of assignments, and the volume of the Bank's business recently handled by the attorney.

While using the criteria above-mentioned, and receiving recommendations of field personnel, the record reflects that the ultimate decision was that of Mr. Rabin.

The Bank takes the position that the attorneys used to close

loans for the Bank are attorneys for the Bank with whom the Bank has an attorney-client relationship; that the attorneys are selected for the purpose of insuring that the Bank obtains a first mortgage on the real estate interest of the borrower pledged as security, according to statutory provisions; that the Bank has the basic and fundamental right of all persons to use counsel of its own choice within the requirements of federal law; and that no federal statute or constitutional provision proscribes the enjoyment of such a right.

The Bank argues that the purpose of restricting the number of attorneys to close its loans is to benefit its borrowers and enable the Bank to efficiently administer a credit system for farmers and ranchers in the area which it serves according to congressional mandate. To accomplish this purpose, the Bank urges that it must be permitted to select attorneys of its own choosing to perform the work for the Bank, the selection to be made by its duly authorized officials.

Plaintiff and the members of the Mississippi State Bar contend that the Bank, as a federal instrumentality, should be required to accept the loan closing services of any Mississippi attorney selected by the borrower who meets reasonable, objective standards and is able and qualified to adequately perform the necessary legal work involved in closing the loan. They argue in support of this position that a failure of the Bank to recognize this right on the part of the members of the Mississippi Bar acts to decrease competition in the handling of interstate loans, denies prospective borrowers the fundamental and traditional right of having their business handled by an attorney of their choice and denies qualified attorneys, who are not on the Bank's approved list, the right to practice their profession and have an opportunity to meet reasonably objective standards so as to engage in the practice of law.

The court must observe at this point that plaintiff and intervenor do not have standing to assert a right on behalf of

prospective borrowers. Since such persons are not parties to the action the court is not therefore, concerned with this aspect of the controversy.

The parties have devoted a large part of their briefs to the question of whether the Bank is an agency of the United States Government. While the Bank owes its existence to the statutory law of the United States, and is subject to federal supervision, it is privately owned and capitalized. 12 U.S.C. §§ 2001 et. seq. In this regard, its operations are not unlike those of a federally chartered savings and loan association, 12 U.S.C. §§ 1464, et seq.; or a national bank, 12 U.S.C. §§ 21 et. seq.; or other financial instrumentalities of the government too numerous here to mention.

The Bank must look to the attorney who certifies the title to provide the Bank with a good, valid and enforceable first mortgage lien on the property involved. Being under such an obligation to the Bank it can hardly be said that the attorney does not represent the Bank in closing the loan or that the relationship of attorney and client does not exist. It is true that the borrower must pay the fee of the attorney for closing the loan, but this is only a part of the loan expense which the borrower assumes as a part of the loan transaction, just as other expenses, such as appraisal fee, recording costs, etc. Such is the normal procedure in the industry.

If a conflict of interest arises the attorney cannot represent both parties. The attorney can be true to only one trust - his allegience cannot be divided. The borrower is not prohibited from employing an attorney of his choice to represent his interest in securing and closing the loan.

It is inconceivable that the court by judicial fiat should compel the Bank to accept the services of any Mississippi attorney, who might or might not be acceptable to it, but who is qualified to perform the work necessary to properly

close a loan for the Bank pursuant to reasonable standards established by the Bank under the court's supervision. In such a case, the Bank would not have any control over the number of attorneys in a given state who would be authorized to close its loans, and the result would be an inefficient and unsatisfactory method of loan closure from which both the Bank and the borrower would suffer. As the United States Court of Appeals for the Fifth Circuit said in a per curiam opinion released December 9, 1974, in ***Forest v. Capital Buildings & Loan Assn.***, 504 F.2d 891 (1974), ***cert. denied***, 421 U.S. 978, 44 L.Ed.2d 470, 95 S.Ct. 1980 (1975), "We agree with the defendant . . . that [its] procedures are in accordance with the basic and fundamental right of all persons to use counsel of [its] own choice and within the requirements of state and federal law."

The court has determined that plaintiff and the class represented by the intervenor, do not have any right of which they have been deprived by the Bank, which is protected by the due process requirement of the Fifth Amendment to the Constitution of the United States. The method used by the Bank for the selection of attorneys to represent it in the closing of loans does not constitute an unreasonable intereference with their right to follow their chosen profession within the "liberty" and "property" concepts of the Fifth Amendment. The right of an attorney to practice law is not impaired or denied by the Bank's procedure.

The court recognized the right of every person to practice his or her chosen profession free from unreasonable governmental interference in ***Lipman v. Van Zant***, 329 F. Supp. 391 (N.D. Miss. 1971). ***See also United States v. Briggs*** 514 F.2d 794, 798 (5th Cir. 1975). The Bank's right to select its own counsel does not, however, impinge upon the right of plaintiff as a member of the Mississippi Bar to practice law. The right to practice does not encompass the right to represent any designated party, whether that party is a private individual, a public institution, or a governmental agency or instrumen-

tality.

The plaintiff and intervenor also contended that the Bank's new closing procedure dampens competition and violates the public policy of the United States as expressed in the Sherman Act and the Administrative Procedure Act. The court is not persuaded that the position is well taken. The fifth Circuit rejected a challenge by the attorneys involved in *Forest, supra*, that the practice followed by the building and loan associations violated the Antitrust provisions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § § 12, *et. seq.*

The intervenor and plaintiff cite a section 81-11-31 of the Mississippi Code Annotated in support of their position. While the state statute would not control the activities of the Bank in any event, the court takes notice of the provision that "[t]he borrower shall be advised by the association in writing of his right to select an attorney, provided, however, such attorney is on an approved list of a title insurance company acceptable to the association, and authorized to do business in the State of Mississippi. Title insurance is used herein as a criterion for qualification of attorneys only, ..." The statute invests title companies authorized to do business in Mississippi with the right to designate the Mississippi attorneys who are to be protected by the statue but provides no guide for such selection. The court is not persuaded that this Mississippi statute enhances the rights here asserted by plaintiff or the intervenor.

The plaintiff and intervenor argue that the action of the Bank in concert with its associations violates the civil rights of plaintiff and other Mississippi attorneys. To support their contention they rely upon 42 U.S.C. § 1985.

(3). The charge against the Bank is that it acted arbitarilly to deprive plaintiff and members of the bar of a "property right" or "interest" within the concepts of the Fifth Amend-

ment. There is no evidence to support the argument that the Bank conspired with anyone to adopt the new closing procedures. The record reflects that in formulating the new procedure, the Bank's legal staff conferred with field personnel including officers of the associations. But there is no evidence to support a theory of conspiracy. The Fifth Circuit in the

F.2d 2d 919, 923 (5th Cir. 1977) listed four elements which are necessary to support an action under Section 1985 (3). The first two are "(1) the defendants must conspire, [and] (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Neither of these elements is shown to exist in the action sub judice.

In summary, the court holds that there is no genuine issue as to any material fact and that the Bank is entitled to a judgment as a matter of law.

The Court will enter the appropriate judgment.

This 22nd. day of March, 1977.

IRMA R. SMITH /s/
UNITED STATES DISTRICT
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1817

D.C. Docket No. EC-74-116-S

JOHN D. SIBLEY,

Plaintiff-Appellant,

VERSUS

THE FEDERAL LAND BANK OF NEW ORLEANS,

Defendant-Appellee,

and

BOARD OF COMMISSIONERS OF THE MISSISSIPPI STATE BAR,

Intervenor-Appellant.

Appeals from the United States District Court for the
Northern District of Mississippi

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-Appellant and the intervenor-Appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

June 20, 1979

APPENDIX D

5 U.S.C.

§ 500 Administrative practice; general provisions

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

12 U.S.C.

§ 2002. Farm Credit System

The Farm Credit System shall include the Federal land banks, the Federal land bank associations, the Federal intermediate credit banks, the production credit associations, the banks for cooperatives, and such other institutions as may be made a part of the System, all of which shall institutions as may be made a part of the System, all of which shall be chartered by and subject to the supervision of the Farm Credit Administration.

§ 2011 Establishment; title; branches

The Federal land banks established pursuant to section 4 of the Federal Farm Loan Act, as amended, shall continue as federally chartered instrumentalities of the United States. Their charters or organization certificates may be modified from time to time by the Farm Credit Administration, not inconsistent with the provisions of this subchapter, as may be necessary or expedient to implement this chapter. Unless an existing Federal land bank is merged with one or more other such banks under section 2181 of this title, there shall be a

Federal land bank in each farm credit district. It may include in its title the name of the city in which it is located or other geographical designation. When authorized by the Farm Credit Administration, it may establish such branches or other offices as may be appropriate for the effective operation of its business.

§ 2013. Land bank stock - Par value; classes

(a) The capital stock of each Federal land bank shall be divided into shares of par value of $5 each, and may be of such classes as its board of directors may determine with the approval of the Farm Credit Administration.

voting stock

(b) Voting stock of each bank shall be held only by the Federal land bank associations and direct borrowers and borrowers through agents who are farmers or ranchers, which stock shall not be transferred, pledged, or hypotheticated[1/] except as authorized pursuant to this chapter.

Nonvoting stock

(d) Nonvoting stock may be issued to the Governor of the Farm Credit Administration, and may also be issued to Federal land bank associations in amounts which will permit the bank to extend financial assistance to eligible persons other than farmers or ranchers. Participation certificates with a face value of $5 each may be issued in lieu of nonvoting stock when the bylaws of the bank so provide.

12 U.S.C.

§ 2014 Real estate mortgage loans

The Federal land banks are authorized to make long-term

real estate mortgage loans in rural areas, as difined by the Farm Credit Administration, and continuing commitments to make such loans under specified circumstances, or extend other financial assistance of a similar nature to eligible borrowers, for a term of not less than five nor more than forty years.

§ 2016 Eligibility

The services authorized in this subchapter may be made available to persons who are or become stockholders or members in the Federal land bank associations and are (1) bona fide farmers and ranchers, (2) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs, or (3) owners of rural homes.

§ 2017. Security

Loans shall not exceed 85 per centum of the appraised value of the real estate security, and shall be secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration. The value of security shall be determined by appraisal under appraisal standards prescribed by the bank and approved by the Farm Credit Administration, to adequately secure the loan. However, additional security may be required to supplement real estate security, and credit factors other than the ratio between the amount of the loan and the security value shall be given due consideration.

§ 2223. Election and appointment of district directors - Electing and appointing bodies

(a) Two of the district directors shall be elected by the Federal land bank associations, two by the production credit associations, and two by the borrowers from or subscribers to the guaranty fund of the bank for cooperatives. The seventh member shall be appointed by the Governor with the advice

and consent of the Federal Farm Credit Board.

§ 2227. Powers of the district farm credit board

(a) Each farm credit district board shall have power to–
(1) Act as the board of directors for the district and of the several banks of the System in the district.

§ 2241. Independent agency of executive branch; composition

The Farm Credit Administration shall be an independent agency in the executive branch of the Government. It shall be composed of the Federal Farm Credit Board, the Governor of the Farm Credit Administration, and such other personnel as are employed in carrying out the functions, powers, and duties vested in the Farm Credit Administration by this chapter.

§ 2242. Federal Farm Credit Board – Establishment; membership; designation and appointment of members

(a) There is established in the Farm Credit Administration a Federal Farm Credit Board. The Board shall consist of not more than thirteen members, one of whom shall be designated by the Secretary of Agriculture. The remainder of the Board shall be appointed by the President, with the advice and consent of the Senate, one from each farm credit district, to be known as the appointed members.

APPENDIX E

12 FEDERAL CODE OF REGULATIONS

§ 614.4230 (a) Primary security for a Federal land bank shall consist of a first lien on interest in real estate. In the case of nonfarm rural home loans, the primary security shall be a first lien on the rural residence being financed. The real estate interest must be mortgageable interest under deeds or leases which reasonably may be considered adequate to afford the security of a first lien upon the rights and interest on which the loan is predicated. Collateral closely aligned with, an integral part of, and normally sold with real estate may be included in the appraised value of the security upon which a loan is based. Appraised value shall be determined within approved standards and shall include in the evaluation either farmlands, eligible farm-related businesses, or eligible rural residences, whichever is appropriate for the type of loan being made.

§ 614.4300 Banks and associations may impose reasonable charges or fees to members, borrowers, or applicants in connection with loans or other services rendered. Fees charged by the associations shall be subject to bank approval.

§ 614.5060 If the chief counsel for a Federal land bank has determined in writing that bank procedures provide sufficient safeguards to assure that a loan made by the bank will be secured by a first lien or its equivalent on interest in the primary real estate security, an attorney lien certification need not be obtained at the time a note is accepted for collateral. The note shall be withdrawn from collateral upon the expiration of one year from the date of loan closing, unless before the end of such period, an attorney has certified that the interest of the bank in the primary real estate security for that loan is a first lien

on the borrower's interest or its equivalent from a security standpoint.

CERTIFICATE OF SERVICE

I, Leslie Darden, an attorney for Petitioner do hereby certify that I have served 3 copies of this Petition upon Grady Tollison, Esq., attorney for The Federal Land Bank of New Orleans, and upon Michael Malski, Esq., attorney for John Sibley by depositing the same in a United States Post Office with first class postage prepaid, addressed to the above named Counsel at their respective post office addresses, which are within 500 miles.

This 7th day of SEPTEMBER, 1979.

Leslie Darden

Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-401

BOARD OF COMMISSIONERS OF THE MISSISSIPPI STATE BAR,
Petitioner

v.

THE FEDERAL LAND BANK OF NEW ORLEANS,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the Federal Land Bank of New Orleans, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion of the Fifth Circuit Court of Appeals is reported at 597 F.2d 459 (5th Cir. 1979), and is found in the Appendix to the Petition.

QUESTIONS PRESENTED FOR REVIEW

During 1973, the Federal Land Bank of New Orleans became concerned over the increasing time lapse between the filing of a loan application and the disbursement of loan proceeds. In 1974 the Bank implemented a loan closing procedure designed to shorten the time lapse and thereby provide the users of its credit service with greater efficiency and economy. New loan closings were to be handled almost exclusively by Association personnel and closing attorneys. As a part of this procedure, a decision was made to reduce the number of attorneys approved for closing loans by seventy percent in the states of Mississippi, Alabama and Louisiana.

As a result of the decision to reduce the list of approved attorneys this litigation was initiated. It is the position of the Federal Land Bank of New Orleans that no issues should be reviewed by the United States Supreme Court. The District Court for the Northern District of Mississippi and the Fifth Circuit Court of Appeals decided correctly the following questions:

1. Does the attorney approved by the Federal Land Bank of New Orleans, at least in part, represent the Bank?

2. May the Federal Land Bank of New Orleans as a federally created lending institution, with strong private enterprise characteristics select an attorney based upon subjective determinations of Federal Land Bank personnel without violating due process provisions of the Fifth Amendment?

3. Were the actions of the Federal Land Bank of New Orleans in reducing the number of attorneys it uses in loan closing procedures a violation of the Sherman Antitrust Act?

ADDITIONAL STATUTES IN CODE OF FEDERAL REGULATIONS INVOLVED

In addition, to the statutes cited by the Petitioner, the following statutes and the Code of Federal Regulations are involved:

12 U.S.C. § 2001

12 U.S.C. § 2012

12 C.F.R. § 600.20.

STATEMENT OF FACTS

The Federal Land Bank of New Orleans is a federally chartered, privately owned, privately capitalized federal instrumentality which makes long-term first mortgage loans on farm land, to farmers and ranchers through its Associations in Mississippi, Alabama and Louisiana. The Federal Land Bank of New Orleans (hereafter referred to as the Bank) is one of twelve Federal Land Banks chartered in 1917 pursuant to Section Four of the Federal Farm Loan Act, 39 Stat. 360, and continued under the Farm Credit Act of 1971, Public Law 92-181, 12 U.S.C. § 2001-2259 (1977 Supp.).

Each of the twelve Federal Land Banks is composed of Associations in the area of operation of the Federal Land Bank of New Orleans. Twelve of these Associations are in Mississippi. The Federal Land Banks and the Associations are part of a comprehensive farm credit system under the supervision of the Farm Credit Administration. 12 U.S.C. § 2002 (Supp. 1977).

Regulations promulgated by the Farm Credit Administration pertaining to Federal Land Banks and

their Associations are found in Title Twelve of the Code of Federal Regulations, § 600-619 (1977). The regulations contain the procedural steps for making Land Bank loans. The prospective borrower makes application to the Land Bank Association in his area, pays application appraisal fees to the Association whose personnel review the borrower's credit, appraise the property constituting the primary collateral, and approve the loan. The borrower then selects one of the attorneys on the Bank's approved list to initiate the appropriate title examination and certify to the Bank the status of the title. The attorney, in addition to these duties, assembles the necessary data from which the promissory note and deed of trust are to be prepared. In addition, the attorney supervises the loan closing and sees that the instruments are recorded thereby protecting the interest of the Bank.

The note and security instruments which are prepared by the attorney are placed by the Bank in a pool of collateral securing Federal Land Bank bonds which are sold by a fiscal agent representing all twelve Land Bank districts. The proceeds from the sale of these bonds, together with accumulated profits from interest on loan payments and income from mineral rights which the Bank owns in the area, constitute the operating capital and funds from which loans are made.

The Bank is required by federal law and regulations to accept only first mortgage loans. Section 2017 of the Farm Credit Act sets forth security requirements for Land Bank loans as follows:

> Loans shall not exceed eighty-five percentum of the appraised value of the real estate security, and shall be secured by first liens on interest in real estate of such classes as may be approved by the Farm Credit Administration. 12 U.S.C. 2017 (Supp. 1977).

Title Twelve of the Code of Federal Regulations provides for first lien security.

> The principal function of the Federal Land Bank is to make first mortgage loans on farm lands to eligible applicants. 12 C.F.R. 600.20 (1977).
>
> Primary security for a federal land bank loan shall consist of a first lien on interest in real estate. 12 C.F.R. 614.4230 (1977).

Section 615.5060 of Title Twelve of the Code of Federal Regulations describes the role and responsibility of the Bank's attorney as follows:

> (a) If the chief counsel for a Federal Land Bank has determined in writing that bank procedures provide sufficient safeguards to assure that a loan made by the bank will be secured by a first lien or its equivalent on interest in the primary real estate security, an attorney lien certification need not be obtained at the time a note is accepted for collateral. The note shall be withdrawn from collateral upon the expiration of one year from the date of loan closing, unless before the end of such period, an attorney has certified that the interest of the bank in the primary real estate security for that loan is a first lien on the borrower's interest or its equivalent from a security standing point. 12 C.F.R. 615.6050(a) (1977).

To comply with the Federal requirements, the Bank has maintained a list of approved attorneys for more than fifty years. Attorneys have been selected by the Bank upon recommendations of field personnel, recommendations of fellow practitioners and by reference to publications such as *Martindale-Hubbell Law Directory*. Through the years, the list of approved attor-

neys grew to over fourteen hundred firms, or approximately three thousand to thirty-five hundred attorneys in the three-state area. Many firms had a longstanding association with the Bank but had closed few loans over the years for varying reasons.

In 1973 the Bank determined that the time lapse between the filing of a loan application and the disbursement of loan proceeds was not in the interest of its customers. It took longer to close loans in only three of the other Land Banks in the country. One Bank closed loans twenty-eight days faster than the Federal Land Bank of New Orleans.

In 1974 the Bank implemented a loan closing procedure designed to provide the users of its credit services with greater efficiency and economy. A decision was made that one route to eliminate the delay was to reduce the number of attorneys approved for closing loans by seventy percent in Mississippi, Alabama and Louisiana. The smaller number of attorneys would improve communications between the Bank and its attorney in implementing more efficient closing requirements. The decision was made by the interaction of Association personnel, the Executive Committee of the Bank, and the Bank's Board of Directors. The Bank sought opinions from field personnel and others to determine which attorneys should remain on the list. The Bank's General Counsel's Office reviewed the attorneys submitted, consulted with staff attorneys concerning the promptness of closing attorneys and made independent additions which culminated in the final list of attorneys selected as approved.

In September 1974 the Bank mailed letters to the firms which had been removed from the list informing

them of the removal. In October 1974 the Bank sent letters to all its borrowers explaining the efforts being made by the Bank to reduce the closing time.

The Bank stressed as strongly as possible its position that the removal of the attorneys from the approved list was not intended as a reflection upon their competency or reputation, but was intended only to achieve a more manageable number of attorneys.

In the fall of 1974 the Plaintiff in this action, Mr. John Sibley, Attorney at Law of Okolona, Mississippi, brought suit for and on behalf of himself and all other lawyers similarly removed from the list. A year and a half later the Board of Commissioners of the Mississippi State Bar filed its Complaint as Applicant for Intervention, alleging that the Bank acted in an arbitrary and capricious manner in regard to the elimination or retention of attorneys on its approved list. The Board of Commissioners further alleged that this arbitrary action was a violation of the due process requirements of the Constitution of the United States and was in restraint of trade.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Attorney In The Loan Closing Process, Between The Bank And The Borrower, Represents The Federal Land Bank Of New Orleans; Therefore, Regardless Of How He Is Selected, It Does Not Implicate The Constitution Or The Sherman Antitrust Act.

The United States District Court in this cause, found as a fact that the attorney represented the Bank. The attorney certified that the title was good. He further prepared the note and the deed of trust. All of these acts were for the benefit of the Bank. The Fifth Circuit Court of Appeals agreed with the fact finding of the District Court.

It is the generally accepted view that when one lawyer is involved in the loan closing procedure, he represents the lender in regard to the title, the preparation of the note, and the preparation of the deed of trust or other security instrument. *See Florida Bar* v. *Teitelman,* 261 So.2d 140 (Fla. 1972); *The Proper Role of the Lawyer in Residential Real Estate Transactions: a Report of the Committee on Residential Real Estate Transactions of the A.B.A.* (1974). The original finder of fact, the United States District Court, expressed the position in such a straight forward and unequivocal manner that the Bank in seeking to show why the Petition for Writ of Certiorari should be denied offers, as an expression of its position, a portion of the Memorandum of Decision:

> It is inconceivable that the Court by judicial fiat should compel the Bank to accept the services of any Mississippi attorney, who might or might not be acceptable to it, but who is qualified to perform the work necessary to properly close a loan for the Bank pursuant to reasonable standards established by the Bank under the Court's supervision. In such a case, the Bank would not have any control over the number of attorneys in a given state who would be authorized to close its loans, and the result would be an inefficient and unsatisfactory method of loan closure from which both the Bank and the borrower would suffer. As the United States Court of Appeals for the Fifth Circuit said in a per curiam opinion released December 9, 1974, in *Forrest* v. *Capital Buildings and Loan Assn.,* 504 F.2d 891 (1974), *cert. den.,* 421 U.S. 978. "We agree with the Defendant . . . that [its] procedures are in accordance with the basic and fundamental right of all persons to use counsel of [its] own choice and within the requirements of state and federal law." Memorandum of Decision, *Sibley* v. *Federal Land Bank of New Orleans,* No. EC74-116-S (N.D. Miss., April 19, 1977).

Similar reasoning was set forth in *Wittenbrock* v. *Parker,* 102 Cal. 93, 36 P. 374 (1894), wherein the California Supreme Court held that regardless of who paid the attorney, he was the attorney for the lender.

The District Court further opined

> The Bank must look to the attorney who certifies the title to provide the Bank with a good, valid and enforceable first mortgage lien on the property involved. Being under such an obligation to the Bank it can hardly be said that the attorney does not represent the Bank in closing a loan or that the relationship of attorney and client does not exist. It is true that the borrower must pay the fee of the attorney for closing the loan, but this is only a part of the loan transaction, just as other expenses, such as appraisal fee, recording costs, etc. Such is the normal procedure in the industry. *Sibley* v. *Federal Land Bank of New Orleans, supra.*

The District Court and the Fifth Circuit Court of Appeals determined that the attorney represented the Bank, thereby precluding the necessity for considering the purported Constitutional and antitrust claims presented in the Petition for Writ of Certiorari; however, even if the substantive claims were considered, they are without merit.

2. The Circuits Which Have Considered The Question Have Determined That Under The Facts As Presented In The Petition For Writ Of Certiorari, There Is No Violation Of Any Of The Antitrust Laws.

The Fifth Circuit Court of Appeals in *Forrest* v. *Capital Building and Loan Assn.,* 504 F.2d 891 (1974),

cert. den. 421 U.S. 978 (1975) determined that in a similar factual situation where a federal savings and loan association allowed only its approved attorneys to close its loans, there was no violation of the Sherman Antitrust Act.

A similar decision was reached by the United States Court of Appeals District of Columbia Circuit in *Foster* v. *Maryland State Savings and Loan Association,* 590 F.2d 928 (D.C. Cir. 1978), *cert. den.* 98 S. Ct. 842 (1979).

In *Forrest* v. *Maryland Savings and Loan Association,* the Court said

> The lender has the same right as the borrower to insist on its own counsel. The Defendant lender here, after an unsatisfactory period of experience permitting the borrower to select its own counsel from a large group of highly rated lawyers (but not necessarily real estate specialists), whom the lender would then use as well, settled upon the practice of employing only one law firm to protect its interest in all these similar home loan transactions. State law and federal regulations allow the lender to charge the borrower for the legal work done for benefit of the lender as a necessary cost of the loan. Irrespective of which counsel is chosen by the borrower, the borrower will thus inevitably pay for the legal services provided to the lender. *Foster* v. *Maryland Savings and Loan Association,* 590 F.2d 930, 931.

The Circuit Court of Appeals for the District of Columbia Circuit agreed with the Fifth Circuit that a lender insisting on a particular attorney to close the loan and charging the borrower its fee was not an antitrust violation.

In *Mortensen* v. *First Federal Savings and Loan Association,* 549 F.2d 884 (3d Cir. 1977), the Third

Circuit determined that if a lawyer as in *Forrest* v. *Capital Savings and Loan Association, supra,* represented the Bank then there would be no tying arrangement. In *Mortensen* such a factual determination had not been made. *Mortensen* v. *First Federal Savings and Loan Association,* 549 F.2d 884, 899.

Subsequently, in *Mortensen* v. *First Federal Savings and Loan,* it was determined by the District Court that there was no antitrust violation as a result of the savings and loan's requiring the borrower to pay for a lawyer selected by the savings and loan. *Mortensen* v. *First Federal Savings and Loan Association,* 79 F.R.D. 603 (D.C.D.N.J. 1978).

The three circuits which have considered the issue have determined that where there is a factual determination that the attorney, at least in part, represents the lender, there is no violation of the Sherman Antitrust Act regardless of who pays or who selects the lawyers. Even if the Federal Land Bank of New Orleans is considered to be subject to the Sherman Antitrust Act, because of its private characteristics, as alleged by the Petitioner, then there would still be no antitrust issue for this Court to consider.

3. There Is No Basis For The Contention That The "Arbitrary Decisions" Of Selecting Attorneys By The Bank Is In Violation Of The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment.

Although the Fifth Amendment to the Constitution of the United States does not mention "equal protection of the laws" pursuant to *Bolling* v. *Sharp,* 347 U.S. 497 (1954) and *Buckley* v. *Valio,* 424 U.S. 1 (1976) equal protection is, of course, an element of due process.

The issue here is whether, if the Bank is a Federal agency, the classification which the list creates, directs is "alleged arbitrary decisions" against any individual or category of persons. It is contended by the Bank that the basis for selecting attorneys was by necessity arbitrary since the goal was to reduce the number of attorneys from a pool of many qualified attorneys. It is contended that under these circumstances, an "arbitrary" reduction of the number of attorneys was a rational basis for reducing the list and thereby creating a more expeditious manner of closing loans for the ranchers and farmers who borrow from the Federal Land Bank of New Orleans.

It is the position of the Bank that if there is some rational basis for reducing the number of attorneys, the method selected, even if "arbitrary" does not rise to the level of a Constitutional issue, if no class as individual was singled out for discriminatory treatment. *See Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976). There is no evidence in the record nor is it alleged, that any category was singled out for removal.

CONCLUSION

The Federal Land Bank of New Orleans has the right to select any attorneys to fulfill its statutory and regulatory duties to its borrowers and the purchasers of its bonds. If it is the Bank's decision that the number of attorneys should be reduced in order to facilitate a more expeditious loan closing procedure and thereby benefit its borrowers and/or bond holders, then it is not only the right but the duty of the Bank to reduce the number of attorneys in whatever way it selects, if no particular group or category is targeted for removal.

If, as the District Court and the Fifth Circuit Court of Appeals determined, the attorney closing loans for the Federal Land represents the Land Bank at least in part, then the Bank has the right to select and approve the attorneys that it uses regardless of who pays.

Under these circumstances, the arguments of the Board of Commissioners of the Mississippi State Bar are without merit. Even if they were considered, the three Courts of Appeals which have considered the question have found that there were no violations of the Sherman Antitrust Act when a federally chartered instrumentality restricts the attorneys who close loans even though the borrower pays the attorney's fees.

There is certainly no merit in claiming that arbitrary decisions not directed at any particular class or group constitute violations of the due process provisions of the Fifth Amendment to the United States Constitution.

The record in this cause is totally devoid of a Federal Question which would justify granting a Writ of Certiorari. Under these circumstances, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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